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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANIEL ZEIGER, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
WELLPET LLC, a Delaware corporation, Defendant.

) Case No. 3:17-cv-04056-WHO
)
)
)
CLASS ACTION
)
PLAINTIFF'S NOTICE OF MOTION
)
AND MOTION FOR CLASS
)
CERTIFICATION; MEMORANDUM
)
OF POINTS AND AUTHORITIES
)
)
)
)
Date: November 18, 2020
)
Time: 2:00 p.m.
)
Dept.: Courtroom 2, 17th Floor
)
Judge: Hon. William H. Orrick
)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 18, 2020 at 2:00 p.m. or as soon thereafter as the matter may be heard, in Courtroom 2, 17th Floor, of the U.S. District Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Daniel Zeiger will and hereby moves the Court for an order for class certification pursuant to Federal Rules of Civil Procedure Rule 23. The classes shall be defined as:

Wellness Class: All persons in California who, from July 1, 2013, to the present, purchased Wellness Complete Health Adult Dry Whitefish and Sweet Potato dog food for household or business use, and not for resale.

Wellness Grain-Free Class: All persons in California who, from July 1, 2013, to the present, purchased Wellness Complete Health Adult Grain Free Whitefish and Menhaden Fish Meal dog food for household or business use, and not for resale.

Core Class: All persons in California who, from July 1, 2013, to the present, purchased Wellness CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon Meal dog food for household or business use, and not for resale.

Excluded from the classes are persons or entities who purchased the Wellness Food for business use or resale; government entities; WellPet and its affiliates, subsidiaries, employees, current and former officers, directors, agents, and representatives; and members of this Court and its staff.

In the alternative, Plaintiff moves pursuant to Fed. R. Civ. P. 23(c)(4) for certification of a liability-only class or certification of common issues.

This motion is based on this Notice of Motion, Memorandum of Points and Authorities, supporting exhibits, the pleadings and documents on file in this case, and such other evidence as may be presented at or before the hearing on this motion.

1 Dated: June 29, 2020
2
3

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case exemplifies the power of a product's labeling and packaging. WellPet has sought to capitalize on the ever-growing and lucrative market of health-conscious pet lovers who consider their pets as family. [REDACTED]

In order to benefit from the known buying preferences of these pet parents, WellPet uses everything in its arsenal—from its company name (WellPet) and its food brand (Wellness) to various promises and statements—to deceive the consumer and promote that its dog food is high quality, healthy, nutritious, and safe. But customers have no way of knowing that WellPet's foods do not live up to its packaging because there is no disclosure of the presence (or risk thereof) of lead, arsenic, or Bisphenol A ("BPA") in the foods. This is not inconsequential.

Plaintiff's choice-based conjoint analysis, reveal that WellPet's affirmations and omissions are material to the reasonable consumer, and drive up the cost of the dog food.

Plaintiff Zeiger seeks certification of classes of California consumers damaged by WellPet's deceptive labeling and packaging in violation of California's consumer protection laws and common law. This Court and numerous others routinely hold that these claims are appropriate for class treatment because deception is determined by an objective, reasonable consumer standard. Since the requirements of Rule 23 of the Federal Rules of Civil Procedure are satisfied in this case, class certification is proper.

II SUMMARY OF THE CASE

A. WellPet's Wrongful Conduct to the Classes

¹ References to “Ex. __” are exhibits to the Declaration of Rebecca A. Peterson in support of this motion.

1 WellPet manufactures and markets Wellness CORE Adult Dry Ocean Whitefish, Herring Meal
 2 and Salmon Meal, Wellness Complete Health Adult Dry Whitefish and Sweet Potato, and Wellness
 3 Complete Health Adult Grain Free Whitefish and Menhaden Fish Meal (collectively, the “Wellness
 4 Food”) as premium dog food that is natural, healthy and nutritious to consumers [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]

15 [REDACTED], WellPet chose to turn a blind eye to the actual *risks and content* of its Wellness Food and
 16 misleadingly marketed the food so it could enjoy the benefits of pet parents’ willingness to pay premium
 17 prices for perceived high quality healthy, nutritious, and safe pet food.
 18

19 Throughout the class period (July 1, 2013 to the present), WellPet deceived consumers into
 20 purchasing the Wellness Food by using, among others, the following marketing claims: (1)
 21 “Uncompromising Nutrition”; (2) “Unrivaled Quality Standards”; (3) “Natural”; (4) “Nothing in excess
 22 and everything in balance”; and (5) “Offers complete health” (collectively, the “Wellness Statements”).
 23 ¶¶10, 11, 16, 46.² It cannot be disputed that these promises relate directly to the desired qualities that

24 [REDACTED] : healthy, nutritious, safe, and natural dog food. *See generally*

25 _____
 26 _____
 27 _____
 28 ² Unless otherwise noted, all references to “¶” are to the Second Amended Class Action Complaint, Dkt. 95.

1 Silverman Report at ¶¶62-80 (Ex. 3); June 29, 2020, Report of Steven Gaskin ¶¶62-63 (“Gaskin Report”)
2 (Ex. 4). In the same vein, the Wellness Statements made certain no consumer would question whether
3 WellPet had quality control requirements that would control the risk or inclusion of any chemicals and
4 contaminants, such as arsenic, lead, and BPA. ¶¶12-13, 21. The Wellness Statements and related
5 omissions are false, misleading, and deceptive because the Wellness Food contained (or had a risk of
6 containing) detectable amounts of arsenic, lead, and BPA [REDACTED]

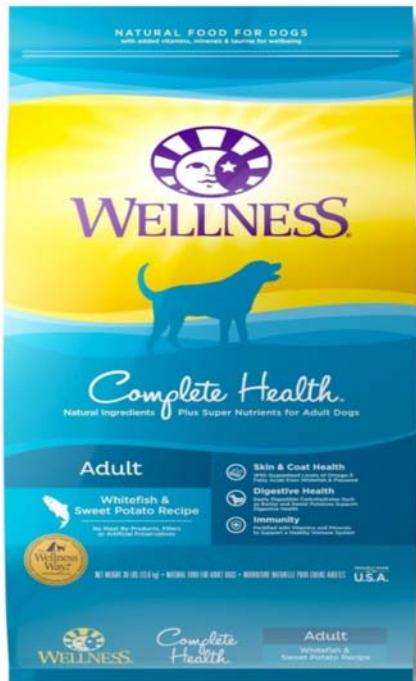
7 [REDACTED]. ¶¶2, 45; WLPT00008059 at -8069 (Ex. 5); WLPT00008105 at -8118 to -8128 (Ex. 6);
8 Defendant’s Corrected Supplemental Answers to Plaintiffs’ First Set of Interrogatories, July 6, 2018,
9 (“Defendants’ Answers”) at 3 (Ex. 7); *see generally* Silverman Report at ¶¶28, 59, 113-115, 120-121 (Ex.
10 3); *see* June 29, 2020, Report of Gary Pusillo at p. 14, Appen. B (“Pusillo Report”); June 29, 2020, Report
11 of Sean P. Callan (“Callan Report”) (Ex. 35). As discussed below, WellPet knew or should have known
12 that the risk or presence of arsenic, lead, and/or BPA made Wellness Food [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] as arsenic and lead are not nutritious and are potentially dangerous contaminants
18 that accumulate in dogs and have been linked to various health issues. ¶¶3, 6; Pusillo Report at 14-18
19 (Ex. 9). [REDACTED] while still highlighting the
20 Wellness Statements on its packaging. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] caused it to not be able
28 to live up to the promises it made consumers on the Wellness Food's packaging.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20
21
22 ³*Id.*; WLPT00008729 (Ex. 11); WLPT00008731 (Ex. 12); WLPT00008733 (Ex. 13); WLPT00008737 (Ex. 14); WLPT00006785 (Ex. 15); WLPT00008727 (Ex. 16); WLPT00008739 (Ex. 17); WLPT00008742 (Ex. 18); WLPT00008749 (Ex. 19); WLPT00008756 (Ex. 20); WLPT00008759 (Ex. 21); WLPT00008762 (Ex. 22); WLPT00008752 (Ex. 23) [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
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10 [REDACTED] [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 WellPet took action based on this knowledge and picked the Wellness Statements to communicate
25 healthy, natural, and safe dog food:
26
27
28



11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28⁵ The Wellness Way seal includes both “Uncompromising Nutrition” and “Unrivaled Quality Standards.”

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
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11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
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19 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 **3. WellPet's Knowledge and Failure to Uphold its Duty to Disclose**
27

28 Common evidence will show [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]. See WLPT00008059 at -8069,
5 -8087 (Ex. 5); see Silverman Report at ¶¶59, 113-114, 120-121 (Ex. 3). WellPet had and continues to
6 have exclusive knowledge of the physical and chemical make-up of the Wellness Food, as well as its
7 manufacturing practices and its testing protocol for ingredient suppliers. ¶52.

8

9 **B. Plaintiff Is Representative of the Classes**

10 Plaintiff purchased the Wellness Food every month from approximately October 2014 until July
11 2017 when he learned that the Wellness Food contained arsenic, lead, and BPA. ¶25; January 11, 2019,
12 Zeiger Dep. at 283:1-5 (Ex. 30). Plaintiff relied upon the Wellness Statements, which along with the
13 omission to any references of arsenic, lead, and BPA, led him to reasonably believe that the Wellness
14 Food did not contain any arsenic, lead, and BPA. ¶25; Zeiger Dep. at 259:17-24; 288:22-291:1; 289:18-
15 23; 292:22-24 (Ex. 30). Plaintiff would not have purchased the Wellness Food had he known that it
16 contained arsenic, lead, and BPA. ¶25, Zeiger Dep. at 304:6-16 (Ex. 30).

17

18 **C. Class Definitions**

19 Plaintiff proposes the following classes:

20

21 *Wellness Class:* All persons in California who, from July 1, 2013 to the present, purchased
22 Wellness Complete Health Adult Dry Whitefish and Sweet Potato dog food for household or
23 business use, and not for resale.

24 *Wellness Grain-Free Class:* All persons in California who, from July 1 2013, to the present,
25 purchased Wellness Complete Health Adult Grain Free Whitefish and Menhaden Fish Meal dog
food for household or business use, and not for resale.

26 *Core Class:* All persons in California who, from July 1, 2013 to the present, purchased Wellness
27 CORE Adult Dry Ocean Whitefish, Herring Meal and Salmon Meal dog food for household or
28

1 business use, and not for resale.⁶

2 Excluded from the Class are persons or entities who purchased the Wellness Food for business
 3 use or resale; government entities; WellPet and its affiliates, subsidiaries, employees, current and former
 4 officers, directors, agents, and representatives; and members of this Court and its staff.

5 **III. ARGUMENT**

6 Rule 23 provides courts with broad discretion in determining whether a class should be certified.

7 *See Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001), *abrogated on other grounds by Johnson*
 8 *v. California*, 543 U.S. 499 (2005). Although the Court's analysis "must be 'rigorous' and may 'entail'
 9 some overlap with the merits of the plaintiff's underlying claim," *Amgen Inc. v. Conn. Ret. Plans and*
 10 *Tr. Funds*, 568 U.S. 455, 465-66 (2013), "Rule 23 grants no license to engage in free-ranging merits
 11 inquiries at the certification stage." *Id.* at 455. Merit questions should only be considered to the extent
 12 "that they are relevant to determining whether the Rule 23 prerequisites ... are satisfied." *Id.* Finally,
 13 courts routinely recognize that consumer protection claims are well-suited for class certification. *Amchem*
 14 *Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *In re First All. Mortg. Co.*, 471 F.3d 977, 992 (9th
 15 Cir. 2006); *Brown v. Hain Celestial Grp., Inc.*, C 11-03082 LB, 2014 WL 6483216, at *15 (N.D. Cal.
 16 Nov. 18, 2014) ("California's approach to proving materiality, reliance, and causation in consumer-
 17 deception cases makes those questions amenable to common proof.").

18 **A. Rule 23(a) Requirements**

19 **1. Numerosity is Satisfied.**

20 "[C]ourts generally find that numerosity is satisfied if the class includes forty or more members."

21 *Bowerman v. Field Asset Servs., Inc.*, No. 13-CV-00057-WHO, 2015 WL 1321883, at *14 (N.D. Cal.
 22

23 ⁶ Collectively referred to as "Class."

1 Mar. 24, 2015). Exact numbers are not required. *Id.* [REDACTED]

2 [REDACTED] June 29, 2020, Report of Colin Weir at ¶50 (“Weir Report”) (Ex. 31).

3 **2. There Are Numerous Common Issues of Fact and Law**

4 Commonality requires showing “that the class members have suffered ‘the same injury’—which
 5 means that the [] claims [] ‘depend upon a common contention’ [] that ‘determination of its truth or falsity
 6 will resolve an issue that is central to the validity of each [claim] in one stroke.’” *Farar v. Bayer AG*, 14-
 7 CV-04601-WHO, 2017 WL 5952876, at *5 (N.D. Cal. Nov. 15, 2017) (quoting *Wal-Mart Stores, Inc. v.*
 8 *Dukes*, 564 U.S. 338, 350 (2011) (“*Dukes*”). “[E]ven a single common question will do,” when this
 9 single question has “[t]he capacity of classwide proceedings to generate common answers apt to drive the
 10 resolution of the litigation.” *Id.* (quoting *Dukes*, 564 U.S. at 350, 359).

11 While one common issue is sufficient, this case presents numerous common issues of law or fact:

- 12 a) Are the Wellness Statements false, deceptive, or misleading?
- 13 b) Are the Wellness Statements representations material?
- 14 c) Did WellPet know the Wellness Statements were misleading?
- 15 d) [REDACTED]
- 16 e) Did WellPet target consumers who want healthy, nutritious and safe dog food?
- 17 f) Did WellPet conceal that the Wellness Food contained or was at risk of containing heavy
 18 metals and/or BPA, and/or that any of the Wellness Statements were false?
- 19 g) Would a reasonable consumer be expected to rely on the following information in
 20 deciding whether to purchase the Dog Food:
 - 21 i. The existence or risk of existence of heavy metals and/or BPA;
 - 22 ii. [REDACTED]
- 23 h) Are the Wellness Statements and/or WellPet’s omissions regarding heavy metals and/or
 24 BPA likely to deceive a reasonable consumer?
- 25 i) Did WellPet have a duty to disclose that the Wellness Food has a risk of containing heavy

1 metals and/or BPA, and/or that the foods did not meet the Wellness Statements?

2 j) Did WellPet breach the express warranties created by the Wellness Statements?

3 k) Does the Wellness Food conform to the promises and affirmations of fact WellPet made
4 on the label or packaging?

5 l) Is WellPet liable for punitive damages based on its active concealment of the risk of
6 heavy metals and/or inclusion or risk of BPA in the Wellness Food?

7 As these common issues demonstrate, Plaintiff's claims rise and fall on WellPet's actions that
8 uniformly applied to all Class members, including whether the WellPet omitted and concealed material
9 information and whether the Wellness Statements are misleading. *See Hanlon v. Chrysler Corp.*, 150
10 F.3d 1011, 1022 (9th Cir. 1998) ("When common questions present a significant aspect of the case and
11 they can be resolved for all members of the class in a single adjudication, there is clear justification for
12 handling the dispute on a representative...."), *overruled on other grounds by Dukes*, 564 U.S. 338. This
13 Court has found such issues sufficient to satisfy commonality in similar labeling cases, supporting the
14 same finding here. *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 562-63 (N.D. Cal. 2020); *Farar*,
15 2017 WL 5952876, at *5; *see also In re Coca-Cola Prods. Mktg. & Sales Practices Litig.* ("Coca-Cola"),
16 14-md-02555-JSW, 2020 WL 759388, at *9-10 (N.D. Cal. Feb. 14, 2020) ("In food labeling cases such
17 as this, courts have concluded that a plaintiff will satisfy the commonality requirement based the question
18 of whether the label would be deceptive to a reasonable consumer.").

21 **3. Plaintiff's Claims Are Typical**

22 Typicality tests "whether other members have the same or similar injury, whether the action is
23 based on conduct which is not unique to the named plaintiff, and whether other class members have been
24 injured by the same course of conduct." *Amey v. Cinemark USA Inc.*, 13-cv-05669-WHO, 2018 WL
25 3956326, at *4 (N.D. Cal. Aug. 17, 2018). Typicality is satisfied if the claims are "are reasonably co-
26 extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d
27 28

1 at 1020. Neither “varying motives” for purchasing a consumer product nor “reli[ance] on something other
 2 than [the Wellness Statements]” defeat typicality. *Brown*, 2014 WL 6483216, at *12.⁷ The same is true
 3 of any variance between what Plaintiff and other class members paid for the Wellness Food. *Id.*
 4 (differences in prices paid “is not a breakdown in typicality; it is a question of individual damages...[that]
 5 need not destroy class cohesion.”).

6 Plaintiff is typical of the Class because “[he] suffered the same type of injury from [WellPet’s]
 7 conduct as other class members.” *Amey*, 2018 WL 3956326, at *5. The fundamental claim of this action
 8 is that the members of the Class, including Plaintiff, were deceived into purchasing WellPet’s dog food
 9 based on the Wellness Statements, when the products contain undisclosed contaminants contrary to those
 10 promises. ¶¶2-13. The type of resulting injury, paying a price premium for the dog food, is also identical
 11 among Plaintiff and the members of the class because the injury stems from WellPet’s uniform
 12 misrepresentations and material omissions. WLPT00000021 (Ex. 32); WLPT00000026 (Ex. 33);
 13 WLPT00014986 (Ex. 34); *see generally* Silverman Report at ¶¶94, 96, 113-114, 120-121 (Ex. 3). *See*
 14 *Brown*, 2014 WL 6483216, at *13 (finding typicality where “the acts of alleged ‘deception,’ the labels,
 15 are uniform—insofar as they are said to violate California law by wrongly making the uniform
 16 [challenged statements] ... [a]nd the named plaintiffs do allege that the whole class was exposed to that
 17 claim.”); *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 378 (N.D. Cal. 2010) (typicality met
 18 where “Plaintiff’s claims here arise out of the allegedly false statement, worded in several variations,
 19 made on every [label] ..., and therefore arise from the same facts and legal theory.”).

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4. Plaintiff and His Counsel Are Adequate

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⁷ As explained in Section III.B.2, the reason these issues do not defeat typicality is because “[l]ooking at
 the wider doctrinal context, under the relevant California law, an inference of common reliance arises if
 representations are material and materiality is judged by an objective standard rather than by any
 understandings specific to the individual consumer.” *Id.* (internal quotation marks omitted).

1 Rule 23(a)(4)'s adequacy "inquiry turns on: (i) whether the named plaintiff and class counsel have
 2 any conflicts of interest with other class members; and (ii) whether the named plaintiff and class counsel
 3 can vigorously prosecute the action on behalf of the class." *Amey*, 2018 WL 3956326, at *6. But perfect
 4 symmetry of interest is not required and not every discrepancy among the interests of class members
 5 renders a putative class action untenable. *Mitchell v. Cate*, No. 2:08-CV-01196, 2014 WL 3689287, at
 6 *8 (E.D. Cal. July 23, 2014). Only conflicts that are fundamental to the suit and that go to the heart of
 7 the litigation prevent a plaintiff from meeting the adequacy requirement. *Id.*; *Sidibe v. Sutter Health*, 333
 8 F.R.D. 463, 488 (N.D. Cal. 2019).

9
 10 In answer to the first question, Plaintiff's "individual claims and class claims arise from the same
 11 course of allegedly deceptive conduct for which [he] seek[s] remedies applicable to and beneficial to the
 12 class." *Broomfield v. Craft Brew All., Inc.*, No. 17-cv-01027-BLF, 2018 WL 4952519, at *7 (N.D. Cal.
 13 Sept. 25, 2018). In answer to the second, Plaintiff has taken an active role in this litigation from the start.
 14 He regularly communicates with counsel, produced documents to Defendant, and sat for two depositions.
 15 Peterson Dec. ¶36. Plaintiff has satisfied his duties as class representative and understands his
 16 responsibilities as a representative of the Class he wishes to represent. Zeiger Dep. at 317:22-318:10 (Ex.
 17 30).

18
 19 Putative class Counsel are qualified lawyers experienced in the successful prosecution of class
 20 actions, and submit their firm resumes setting forth their experience and expertise in the management and
 21 leadership of class action litigation. *See* Firm Resumes (Exs. 36-41). These firms have already
 22 undertaken substantial work in this litigation and will continue to devote the resources necessary to see
 23 this case through to a successful outcome. Rule 23(a)'s adequacy requirement is satisfied.

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 25
 26 **B. The Requirements of Rule 23(b) Are Satisfied**

27
 28 **1. Common Issues Predominate**

Predominance "ask[s] 'whether the common, aggregation-enabling issues in the case are more

1 prevalent or important than the non-common, aggregation-defeating, individual issues.”” *Senne v. Kan.*
 2 *City Royals Baseball Corp.*, 934 F.3d 918, 938 (9th Cir. 2019) (quoting *Tyson Foods, Inc. v. Bouaphakeo*,
 3 136 S. Ct. 1036, 1045 (2016). This inquiry “begins, of course, with the elements of the underlying cause
 4 of action.” *Amey*, 2018 WL 3956326, at *6. Any elements that raise individual issues, however, should
 5 not be considered in a vacuum. In carrying out its duty to perform a rigorous analysis, a court is tasked
 6 with balancing the issues requiring individualized proof against the common questions of law or fact. *See*
 7 *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 560 (9th Cir. 2019) (the “predominance inquiry is
 8 mainly concerned with ‘the balance between individual and common issues.’”); *Kelley v. Microsoft Corp.*,
 9 395 Fed. Appx. 431, 432 (9th Cir. 2010) (finding reversible error because the district court failed to
 10 analyze whether other elements of a claim present a common question of law of fact to class members).
 11

12 Here, balancing the common issues against any purported individual issues demonstrates that the
 13 common issues predominate. *See Chavez*, 268 F.R.D. at 378-79 (where plaintiffs allege defendant falsely
 14 represented the geographic origin of a beverage on the label, “class issues … predominate over individual
 15 issues” in part because for FAL, UCL, and CLRA claims, “relief is available without individual showing
 16 of reliance.”)⁸ Further, Defendant’s core defenses that its Wellness Food is safe, its labeling is not false,
 17 and the misrepresentations or omissions are not material to a reasonable consumer rely upon common
 18 proof applicable to all Class members, further demonstrating predominance is satisfied. *See Amey*, 2018
 19 WL 3956326, at *7 (predominance is met where a defendant is “attacking a common issue with common
 20 proof”).
 21

22
 23 a. ***UCL, FAL, and CLRA claims***

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 27 ⁸ “UCL” refers to the California Unfair Competition Law, Cal. Bus. & Prof. Code §§17200, *et seq.*; “FAL” refers to the California False Advertising Law, Cal. Bus. & Prof. Code §§17500, *et seq.*, and “CLRA” refers to the California Consumer Legal Remedies Act, Cal. Civ. Code §§1750, *et seq.*

1 The “CLRA and FAL prohibit false or misleading advertising, and the UCL creates a cause of
 2 action for business practices that are unlawful, unfair, or fraudulent.” *Zeiger v. WellPet LLC*, 304 F. Supp.
 3d 837, 850 (N.D. Cal. 2018) (citing Cal. Bus. & Prof. Code §17500, Cal. Civ. Code §1770(a), and Cal.
 4 Bus. & Prof. Code §17200).⁹ “The California Supreme Court has recognized that ‘these laws prohibit not
 5 only advertising which is false, but also advertising which[,] although true, is either actually misleading
 6 or which has a capacity, likelihood or tendency to deceive or confuse the public.’” *Zeiger*, 304 F. Supp.
 7 3d at 850-51 (alteration in original) (quoting *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951 (2002)). These
 8 claims are often given class treatment because the core issues of materiality, reliance, and causation
 9 “make up the bulk and engine,” making them “amenable to common proof.” *Brown*, 2014 WL 6483216,
 10 at *15.
 11

12 FAL, UCL, and CLRA claims are often intertwined. *Zeiger*, 304 F. Supp. 3d at 850-51 (citing
 13 *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1089 (N.D. Cal. 2018) and *Williams v. Gerber Prods.*,
 14 552 F.3d 934, 938 (9th Cir. 2008)). All use the reasonable consumer standard in determining liability for
 15 a “deceptive or misleading” business practice. *Id.*¹⁰ Further, CLRA and FAL violations may create
 16 liability “under the UCL’s ‘unlawful’ prong.” *Zeiger*, 304 F. Supp. 3d at 852. Thus, courts generally
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 21 ⁹ Each prong of the UCL is “a separate and distinct theory of liability.” *Kearns v. Ford Motor Co.*, 567
 22 F.3d 1120, 1127 (9th Cir. 2009). “A business practice is ‘unfair’ if it is immoral, unethical, oppressive,
 23 unscrupulous, or substantially injurious to consumers. *Guido v. L’Oreal, USA, Inc.*, 284 F.R.D. 468, 481.
 24 An “unlawful” practice is any practice forbidden by law, and false advertising, as alleged here, “can never
 25 be a lawful business practice.” *Id.* “To succeed under the ‘fraudulent’ prong, plaintiffs ‘need only show
 26 that members of the public are likely to be deceived’ by the advertising or marketing campaign, which
 27 can be demonstrated by the effect the advertisement has on ‘the reasonable consumer.’” *Id.*
 28

¹⁰ Under UCL’s “unfair” prong, Plaintiff need only show that WellPet’s conduct is “immoral, unethical,
 26 oppressive or unscrupulous and causes injury to consumers which outweighs its benefits.” *Nagrampa v.
 27 MailCoups Inc.*, No. C03-00208 MJJ, 2007 WL 2221028, at *2 (N.D. Cal. July 30, 2007). The UCL
 28 “focus[es] on the defendant’s conduct, rather than the plaintiff’s damages...” *In re Tobacco II Cases*, 46
 Cal. 4th 298, 312 (2009). Whether WellPet’s conduct violated the “unfair” prong of the UCL would be
 applicable to the Class.

1 consider the UCL, FAL, and CLRA together in evaluating predominance. *See Brown*, 2014 WL 6483216,
 2 at *15; *see also Broomfield*, 2018 WL 4952519, at *10 (“For the purposes of class certification, Plaintiffs’
 3 CLRA, UCL, and FAL claims are ‘materially indistinguishable’”) (quoting *Forcellati v. Hyland’s, Inc.*,
 4 CV 12-1983, 2014 WL 1410264, at *9 (C.D. Cal. Apr. 9, 2014)).

5 Plaintiff’s allegations concerning “WellPet’s knowledge that they should have known of the
 6 presence of contaminants in their [Wellness Food] based on their affirmative representations” sufficiently
 7 support Plaintiff’s omissions-based claims. *Zeiger*, 304 F. Supp. 3d at 852; *see also id.* at 846-47
 8 (“plaintiffs’ claims in this matter are not solely based on the theory that defendants’ Products are unsafe
 9 due to the presence of arsenic, lead, and BPA, but also that those products omit on their labeling their
 10 presence altogether.”); *Herron v. Best Buy Co.*, 924 F. Supp. 2d 1161, 1177 (E.D. Cal. 2013) (“A partial
 11 representation claim may arise when ‘the defendant makes representations but does not disclose facts
 12 which materially qualify the facts disclosed, or which render his disclosure likely to mislead.’”) (quoting
 13 *Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d at 294 (1970)); *McAdams v. Monier, Inc.*, 105
 14 Cal. Rptr. 3d 704, 712 (Ct. App. 2010) (“Here, plaintiff has alleged affirmative representations by Monier
 15 regarding its roof tiles ... that were likely to mislead consumers by failing to disclose the known fact that
 16 the color composition of Monier’s roof tiles erodes to bare concrete”); *Kahane v. Jansen*, No.
 17 A115269, 2008 WL 5077628, at *17 (Cal. Ct. App. Dec. 3, 2008) (stating that “[t]o the contrary, the
 18 claims of concealment and affirmative misrepresentation are not necessarily mutually exclusive, but can
 19 be mirror images of the same conduct.”). In connection to the CLRA, FAL, and UCL Claims, the
 20 “[q]uestions of materiality and reliance are determined based upon the reasonable consumer standard...
 21 and a showing of materiality is sufficient to raise an inference of classwide reliance.” *Allen v. Conagra*
 22 *Foods, Inc.*, 331 F.R.D. 641, 658 (N.D. Cal. 2019) (decertification of non-California classes); *Daniel v.*
 23 *Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (“That one would have behaved differently can be
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1 presumed, or at least inferred, when the omission is material.”); *see also Stearns v. Ticketmaster Corp.*,
 2 655 F.3d 1013, 1022 (9th Cir. 2011) (presumption of reliance applies where omission or failure to
 3 disclose are “material”), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)
 4 ; *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 242 (N.D. Cal. 2014) (“an inference of common reliance
 5 arises if representations are material”); *In re Arris Cable Modem Consumer Litig.*, 327 F.R.D. 334, 365
 6 (N.D. Cal. 2018) (“UCL, CLRA, and FAL claims that rely on a theory of fraudulent omission are ...
 7 susceptible to classwide proof ... reliance can be inferred when an omission is material” and materiality
 8 “is determined using a ‘reasonable consumer’ standard.”).

9
 10 Thus, Plaintiff can and will “show that members of the public are likely to be deceived,” *Zeiger*,
 11 304 F. Supp. 3d at 850, “without individualized proof by establishing (with, for example, market
 12 research) that the statements would be material to a reasonable member of the ... class.” *Allen v. Conagra*
 13 *Foods, Inc.*, 331 F.R.D. at 658; *Yokoyama v. Midland Nat'l Bank Ins. Co.*, 594 F.3d 1087, 1093 (9th Cir.
 14 2010) (Because Hawaii uses an objective test for reliance, “[t]he jury will not have to determine whether
 15 each plaintiff subjectively relied on the omissions, but will instead have to determine only whether those
 16 omissions were likely to deceive a reasonable person. This does not involve an individualized inquiry.”);
 17 *Coca-Cola*, 2020 WL 759388, at *10 (“To establish a label is misleading under each of these statutes,
 18 Plaintiffs must satisfy the ‘reasonable consumer’ standard.”).

19
 20 CLRA, FAL, and UCL “fraudulent” claims based on omissions require a showing that “the
 21 omission [is] contrary to a representation actually made by the defendant, or an omission of a fact the
 22 defendant was obliged to disclose.” *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835
 23 (2006), *as modified* (Nov. 8, 2006). A duty to disclose arises if a defendant (1) “has exclusive knowledge
 24 of material facts not known or reasonably accessible to the plaintiff,” (2) “actively conceals a material
 25 fact,” or (3) “makes partial representations that are misleading because some other material fact has not
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1 been disclosed.” *Collins v. eMachines, Inc.*, 134 Cal. Rptr. 3d 588, 593 (Ct. App. 2011), *as modified*
 2 (Dec. 28, 2011).

3 Plaintiff’s CLRA, FAL, and UCL claims are amenable to class treatment because as this Court
 4 has recognized with respect to California’s consumer protection statutes,

5 [t]he relevant analysis under California law does not consider whether each class member
 6 saw and relied on each of the Challenged Statements and in what combination, but instead
 7 whether the Challenged Statements were used consistently through the Class Period,
 8 supporting an inference of classwide exposure, and whether the Challenged Statements
 would be material to a reasonable consumer.

9 *Krommenhock*, 334 F.R.D. at 563-64 (citing *Hadley*, 324 F. Supp. 3d at 1095 (N.D. Cal. 2018)). *See also*
 10 *Allen*, 331 F.R.D. at 666, 670 (granting class treatment of UCL, CLRA, and FAL claims because they
 11 are premised on the reasonable consumer standard and recognizing they are routinely certified); *Martin*
 12 *v. Monsanto Co.*, No. 16-2168(JFW), 2017 WL 1115167, at *6 (C.D. Cal. Mar. 24, 2017) (“Under both
 13 the UCL and FAL, relief is available without individualized proof of deception, reliance, and injury.”)
 14 (citing *In re Tobacco II Cases*, 46 Cal. 4th at 320).

16 Furthermore, Plaintiff’s claims here will stand or fall with respect to the entire Class, rather than
 17 succeed as to some members of the Class but not to others. *See, e.g., McCowen v. Trimac Transp. Servs.*
 18 *(W.), Inc.*, 311 F.R.D. 579, 588 (N.D. Cal. 2015) (“class-wide legal questions predominate because the
 19 legality of the ABP system, which applied uniformly to drivers, lies at the foundation of each of the wage
 20 claims”). Specifically, common evidence will be used to answer, on a class-wide basis, whether (1)
 21 WellPet made uniform misrepresentations on, and omissions from, its packaging of the Wellness Food;
 22 (2) [REDACTED];
 23 (3) the misrepresentations and omissions are material or likely to deceive a reasonable consumer, and (4)
 24

1 WellPet had a duty to disclose, can all be resolved by common evidence.¹¹ For example, Plaintiff can
2 establish that WellPet made uniform misrepresentations and omissions [REDACTED]

3 [REDACTED] WLPT00000021
4 (Ex. 32); WLPT00000026 (Ex. 33); WLPT00014986 (Ex. 34); *see generally* Silverman Report at ¶94
5 (Ex. 3). Plaintiff will also establish materiality through common evidence such as the expert opinions of
6 Bruce G. Silverman and Steven Gaskin, which show WellPet's representations and omissions are
7 material to the reasonable consumer. *See generally* Silverman Report at ¶¶59, 96, 113-114, 120-121 (Ex.
8 3); Gaskin Report (Ex. 4). [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
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18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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28 ¹¹ Materiality is to be “addressed at trial or in a ruling on a summary-judgment motion [and] should not be resolved in deciding whether to certify a proposed class.” *Amgen*, 568 U.S. 455 at 470.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]. This evidence sufficiently demonstrates that Plaintiff has “met [his] burden to
6 show a fact-finder would be able to answer the question of whether the statements are material to a
7 reasonable consumer on a class-wide basis.” *Coca-Cola*, 2020 WL 759388, at *14; *see also*
8 *Krommenhock*, 334 F.R.D. at 565-66 (finding plaintiff’s marketing expert and defendants’ own
9 documents ample common proof of materiality).

10
11 This same common evidence is relevant to WellPet’s duty to disclose as it shows (1) uniform
12 partial representations (the Wellness Statements) are misleading because WellPet failed to disclose
13 material facts (the risk of and/or inclusion of heavy metals and/or BPA), and (2) WellPet had and
14 continues to have exclusive knowledge of the physical and chemical make-up of the Wellness Food, as
15 well as its manufacturing practices and policies, and its testing protocol for ingredient suppliers. ¶52.
16 This is sufficient common evidence for a classwide determination on a duty to disclose. *See Wolin v.*
17 *Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (defendant’s “duty to disclose its
18 knowledge” was a common issue predominating statutory consumer fraud claims); *Chamberlain v. Ford*
19 *Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005) (class certification proper where “a common nucleus of
20 facts and potential legal remedies dominate this litigation, such as ... whether Ford had a duty to disclose
21 its knowledge and failed to do so.”).

22 Once Plaintiff proves these core issues, he can prove the resultant injury across the Class. *Kwikset*
23 *Corp. v. Superior Court*, 51 Cal. 4th 310, 329 (2011) (“For each consumer who relies on the truth and
24 accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is

1 the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise
 2 might have been willing to pay if the product had been labeled accurately.”). Predominance is satisfied.
 3

4 ***b. Breach of express warranty claim***

5 “In order to plead a breach of express warranty claim, plaintiffs must allege facts sufficient to
 6 show that ‘(1) the seller’s statements constitute an affirmation of fact or promise or a description of the
 7 goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached.’” *Zeiger*,
 8 304 F. Supp. 3d at 853. The Court already recognized that “[j]udges in this district have found that
 9 statements on a food label can create an express warranty” and that the Wellness Statements “are
 10 sufficient under California law to constitute express warranties.” *Id.*

11 The remaining elements are subject to common proof because “[p]roof of reliance on specific
 12 promises or *representations* is not required,” and Plaintiff must simply “demonstrate that the alleged
 13 misrepresentation would have been material to a reasonable consumer.” *In re ConAgra Foods, Inc.*, 90
 14 F. Supp. 3d 919, 984-85 (C.D. Cal. 2015), *aff’d sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121
 15 (9th Cir. 2017), and *aff’d*, 674 Fed. Appx. 654 (9th Cir. 2017). As a result, “[c]ourts have found that
 16 breach of express warranty claims are appropriate for class treatment where whether defendant
 17 misrepresented its product and whether such misrepresentation breached warranties are issues common
 18 to members of the putative class” and “plaintiffs can demonstrate that the alleged misrepresentation
 19 would have been material to a reasonable consumer.” *Id.* at 985. *See also Allen v. Hyland’s Inc.*, 300
 20 F.R.D. 643, 666-69 (C.D. Cal. 2014) (certifying class with respect to CLRA, UCL, FAL, and express
 21 warranty claims).

22 Those are precisely the factors at play here. The only questions remaining are whether WellPet’s
 23 express warranties are material, and whether it breached the warranties. These issues predominate and
 24 will be proven through the same common evidence used to support Plaintiff’s UCL, CLRA, and FAL

1 claims. *See Lilly*, 308 F.R.D. at 242 (finding common issues predominate plaintiffs' CLRA and FAL
 2 claim, and " proving the 'unfair' and 'unlawful' prongs of the UCL also do not depend upon any issues
 3 specific to individual consumers, and neither does the breach of warranty claim."); *Brown*, 2014 WL
 4 6483216, at *1, *15-20 (certifying classes pursuing UCL, CLRA, and breach of express warranties
 5 claims); *Martin*, 2017 WL 1115167, at *7-8 (predominance met because "[w]hether ... a statement
 6 constitutes an express warranty, whether that warranty was breached, and whether that statement was
 7 likely to deceive a reasonable consumer are issues subject to common and generalized proof.").

9 ***c. Breach of implied warranty claim***

10 An implied warranty of merchantability guarantees that goods "(1) Pass without objection in the
 11 trade under the contract description. (2) Are fit for the ordinary purposes for which such goods are used.
 12 (3) Are adequately contained, packaged, and labeled. (4) Conform to the promises or affirmations of fact
 13 made on the container or label." Cal. Civ. Code §1791.1(a). As this Court recognized, Plaintiff is
 14 "proceed[ing] under the theory that WellPet's Products are not merchantable because they fail to
 15 '[c]onform to the promises or affirmations of fact made on the container or label if any.'" *Zeiger*, 304 F.
 16 Supp. 3d at 854-55 (second alteration in original); *see also Hauer v. Zogarts*, 14 Cal. 3d 104, 117-18
 17 (1975) ("Merchantability has several meanings ... [such as] the product must conform to the promises or
 18 affirmations of fact made on the container or label.") (internal quotation marks and alterations omitted).

21 Whether the Wellness Food conforms to the labels' promises and affirmations of fact is a common
 22 issue of fact that will be proven using the same common evidence detailed above for the express warranty
 23 claim. The breach of implied warranty claim is therefore well-suited for class treatment. *See Sloan v.*
 24 *Gen. Motors LLC*, 16-CV-07244-EMC, 2020 WL 1955643, at *53 (N.D. Cal. Apr. 23, 2020) (granting
 25 class treatment of breach of implied warranty claim); *see also Keegan v. Am. Honda Motor Co.*, 284
 26 F.R.D. 504, 537 (C.D. Cal. 2012) (breach of implied warranty claim "susceptible of common proof");
 27
 28

1 *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 568-69 (S.D. Cal. 2012).

2 **2. A Class Action is the Superior Method of Adjudication**

3 “In determining superiority, courts must consider the four factors of Rule 23(b)(3).” *Zinser v.*
 4 *Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001). The first factor requires analyzes “the
 5 class members’ interests in individually controlling the prosecution or defense of separate actions.” Fed.
 6 R. Civ. P. 23(b)(3)(A). When individual damages are small, this factor weighs in favor of certification.
 7 *Zinser*, 253 F.3d at 1190. The small amount of individual damages for members of the Class here
 8 demonstrates that individual actions would undoubtedly result in negative value propositions based on
 9 the cost of obtaining the type of evidence (including expert evidence) necessary to litigate this case. As
 10 a result, no reasonable consumer would bring such an action. Accordingly, this factor weighs in favor of
 11 class certification. *See Wolin*, 617 F.3d at 1175-76; *see also Marsh v. First Bank of Delaware*, 11-cv-
 12 05226-WHO, 2014 WL 554553, at *15 (N.D. Cal. Feb. 7, 2014) (finding superiority where “each
 13 proposed class members’ recovery is likely to be too low for that person to bring an individual action.”).

14 The second factor requires a court to determine “the extent and nature of any litigation concerning
 15 the controversy already begun by or against class members.” Fed. R. Civ. P. 23(b)(3)(B). This factor is
 16 also met as there are no other pending actions against WellPet. *See Marsh*, 2014 WL 554553, at *15
 17 (finding superiority where “there is no evidence before the Court of any other private actions against any
 18 of the defendants alleging the same misconduct or that any likely class member has an interest in
 19 prosecuting a separate action.”).

20 The third factor examines “the desirability or undesirability of concentrating the litigation of the
 21 claims in the particular forum.” Fed. R. Civ. P. 23(b)(3)(C). This factor also weighs in favor of class
 22 certification because Plaintiff is a citizen of this District, and there is no other more desirable forum in
 23 which to litigate his claims. Finally, the Court must consider “the likely difficulties in managing a class
 24

1 action.” Fed. R. Civ. P. 23(b)(3)(D). This case does not present any manageability concerns because it
 2 involves only California law and is premised upon uniform misrepresentations and omissions on the
 3 packaging of three pet food products. However, should the Court find otherwise, it should not refuse to
 4 certify a class on the basis of manageability alone “given the variety of procedural tools courts can use
 5 to manage the administrative burdens of class litigation.” *Briseno*, 844 F.3d at 1128. This factor weighs
 6 in favor of class certification.
 7

8 **C. Damages**

9 At the class certification stage, “Plaintiff[] need only show that such damages can be determined
 10 without excessive difficulty and attributed to their theory of liability.” *Just Film, Inc. v. Buono*, 847 F.3d
 11 1108, 1121 (9th Cir. 2017); *see also Comcast*, 569 U.S. at 35. Plaintiff will present evidence supporting
 12 a price premium damages theory for the Class, which is consistent with Plaintiff’s liability theories and
 13 provide the common method this Circuit and *Comcast* require.
 14

15 Plaintiff’s damages model directly tracks his theory of the case. Plaintiff’s expert, Steven P.
 16 Gaskin, conducted a choice-based conjoint (“CBC”) study “to determine the relative market values of a
 17 product with and without a particular product feature or claim on the label, or given the disclosure or
 18 non-disclosure of a product defect feature at the time and point of first purchase.” *See* Gaskin Report at
 19 ¶13 (Ex. 4). In a CBC study, “consumers are shown sets of product profiles made up of varying features
 20 (“choice sets”) and asked, as part of a series of ‘choice tasks,’ to indicate their preferred product profile
 21 among those shown....” *Id.* ¶15 (Ex. 4). [T]he analysis is based on choices respondents make among
 22 alternative product profiles like those shown in the choice tasks described in [Gaskin’s] report.” *Id.* ¶17
 23 (Ex. 4). “The general idea behind conjoint analysis is that the market value for a particular product is
 24 driven by features, or descriptions of features, embodied in that product.” *Id.* ¶16 (Ex. 4). “The conjoint
 25 analysis uses data from the survey on the feature levels of the product profiles shown, and the resulting
 26 choices of respondents, to generate partial contributions of these feature levels (“partworths”) to overall
 27 choices.” *Id.* ¶18 (Ex. 4). The analysis “then adds up the partial contributions of all the features to
 28 determine the total market value for the product.” *Id.* ¶19 (Ex. 4).

1 product utility.” *Id.* ¶20 (Ex. 4).

2 Here, Mr. Gaskin designed and implemented a scientifically valid CBC study to determine the
 3 market value attributable to the Wellness Statements and related omissions. *Id.* at ¶¶10-12, 48. This CBC
 4 took into account relevant economic considerations. *See* Weir Report at ¶¶24-40 (Ex. 31). Mr. Gaskin’s
 5 CBC study surveyed 442 respondents (27 of whom were based in California) to “determine the market
 6 price premium for the Wellness Foods (measured in dollars and/or percentage terms) with the omissions
 7 and misrepresentations, compared to the value of these Wellness Foods without the omissions and
 8 misrepresentations.” *Id.* ¶20 (Ex. 31). The CBC study found a market price premium associated with each
 9 of the Wellness Statements and each of the omissions. *Id.* ¶62 (Ex. 31). That is, the misrepresentations
 10 and omissions proved to be material, resulting in significant price premiums for the Wellness Statements
 11 and omissions. *Id.* ¶¶62-63 (Ex. 31).

12 This model is precisely what the Court accepted in *Krommenhock*. 334 F.R.D. at 574-75. It
 13 properly measures “only those damages attributable” to Plaintiff’s theory of liability—WellPet’s
 14 misrepresentations and omissions regarding the risk of heavy metals and BPA in its Wellness Food—
 15 resulting in a finding that each misrepresentation and omission carries a price premium. *Krommenhock*,
 16 334 F.R.D. at 575; Weir Report at ¶¶52-54, 62 (Ex. 31). This price premium is common to each member
 17 of the Class and can be used, and was used by Plaintiff’s expert, to calculate the economic loss the Class
 18 suffered due to WellPet’s deceptive labeling. *See* Weir Report at ¶¶46-50 (Ex. 31).

19 Other courts in this District, as well as others, have also accepted class-wide damages models
 20 based on surveys. *See, e.g., In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 1023-32 (holding that the
 21 proposed survey analysis was “sufficiently reliable to be used in calculating class-wide damages,” and,
 22 therefore, satisfied *Comcast* as part of a hybrid damages methodology); *Broomfield*, 2018 WL 4952519,
 23 at *14 (“The price-premium results of this [choice-based conjoint] analysis can then be used to determine
 24

1 the amount of restitution owed to each class member"); *Guido v. L'Oreal, USA, Inc.*, No. 2:11-cv-
 2 01067-CAS (JCx), 2014 WL 6603730, at *5, *14 (C.D. Cal. July 24, 2014) (finding a survey
 3 methodology to be an admissible way to calculate class-wide damages); *TV Interactive Data Corp. v.*
 4 *Sony Corp.*, 929 F. Supp. 2d 1006, 1019-20 (N.D. Cal. 2013); *In re Toyota Motor Corp. Hybrid Brake*
 5 *Mktg., Sales Practices & Prods. Liab. Litig.*, No. 10-2172, 2012 WL 4904412, at *3-4 (C.D. Cal. Sep.
 6 20, 2012). Plaintiff's model supports class certification.

8 **D. Alternative Rule 23(c)(4) Limited Issues Class**

9 Rule 23(c)(4) provides that, “[w]hen appropriate[,] ‘an action may be brought or maintained as a
 10 class action with respect to particular issues.’” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1229
 11 n.3, 1234 (9th Cir. 1996) (citing Fed. R. Civ. P. 23(c)(4)(A)).¹² In fact, Rule 23(c)(4) has been recognized
 12 as a “management device[]” that “imposes a duty on the court and gives it ample power to treat common
 13 things in common and to distinguish the distinguishable.” *In re Activision Sec. Litig.*, 621 F. Supp. 415,
 14 438 (N.D. Cal. 1985). In order to obtain Rule 23(c)(4) issue certification, Plaintiff need not meet the
 15 predominance requirement. *See Avilez v. Pinkerton Gov't Servs., Inc.*, 596 Fed. Appx. 579, 579-80 (9th
 16 Cir. 2015). “Courts have applied subdivision (c)(4)(A) to allow a partial class action to go forward,
 17 leaving questions of reliance, damages, and other issues to be adjudicated on an individual basis.” 7A
 18 Wright & Miller, *Federal Practice and Procedure: Civil* §1790 (3d ed.). Issue certification can be
 19 employed “even if only one common issue can be identified as appropriate for class treatment, that is
 20 enough to justify the application of the provision as long as the other Rule 23 requirements are met.” *Id.*;
 21 *see also Frlekin v. Apple Inc.*, 13-03451, 2015 WL 6851424, at *2 (N.D. Cal. Nov. 7, 2015).

22 It is well-established that the standard upon which to judge Rule 23(c)(4) certification is whether
 23

24 ¹² Likewise, “Rule 42(b) permits a court to divide up a single action into separate trials, thereby treating
 25 individual claims in phases, rather than en masse.” *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 658
 26 (C.D. Cal. 2000).

1 “the adjudication of the certified issues would significantly advance the resolution of the underlying case,
 2 thereby achieving judicial economy and efficiency.” *Valentino*, 97 F.3d at 1229. Here, it is indisputable
 3 that certifying all issues related to liability or even core liability issues—like whether WellPet (1) made
 4 material misrepresentations and omissions, (2) was aware of the falsity of its representations and that it
 5 was making material omissions, (3) had a duty to disclose, and (4) that these omissions had the likelihood
 6 or capacity to deceive a reasonable consumer—would significantly advance the resolution and economize
 7 judicial resources, and provide a more efficient mechanism that relitigating these issues time and again.

9 Accordingly, if the Court rejects Plaintiff’s damages model, it can and should grant issue
 10 certification as to liability for his claims. *Lilly*, 308 F.R.D. at 244 (rejecting full refund damages model,
 11 but certifying “the proposed class solely for purposes of determining liability” pursuant to Rule 23(c)(4)
 12 because common issues predominated plaintiff’s express warranty, CLRA, FAL, and UCL claims);
 13 *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 533 (C.D. Cal. 2015), modified, 314 F.R.D. 312 (C.D. Cal.
 14 2016) (“court can, in the alternative, bifurcate under Rule 23(c)(4) and certify a liability-only class,
 15 eliminating the need to address at this time any issues relating to restitution or damages.”).

17 Alternatively, the Court should certify certain or all issues identified in Section III.A.2 because
 18 interests of judicial economy and efficiency call for adjudicating these issues in one as opposed to
 19 hundreds or thousands of separate individual trials given that the same witnesses and evidence would be
 20 presented at each trial. *See Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 697 (9th Cir. 1977)
 21 (affirming certification of whether misrepresentations and omissions were made and their materiality,
 22 and excluding other issues like reliance and causation); *Frlekin*, 2015 WL 6851424, at *2 (certifying
 23 class on the single issue of whether “Apple had to compensate its employees for time spent waiting for
 24 bag searches to be completed”); *In re Activision Sec. Litig.*, 621 F. Supp. at 438 (finding “it both
 25 appropriate and desirable to certify a defendant class of underwriters to litigate the single issue under §
 26
 27
 28

12(2) of material misrepresentations and omissions in the offering materials.”).

2 **E. Plaintiff Meets the Rule 23(b)(2) Requirements**

3 Plaintiff seeks Rule 23(b)(2) certification to prohibit the future sale of misbranded dog food.

4 “Class certification is appropriate under Rule 23(b)(2) when ‘the party opposing the class has acted or

5 refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding

6 declaratory relief is appropriate respecting the class as a whole.’” *Kihn v. Bill Graham Archives, LLC*,

7 No. 17-CV-05343-YGR, --- F. Supp. 3d ---, 2020 WL 1820708, at *22 (N.D. Cal. Apr. 10, 2020). Rule

8 23(b)(2) certification is warranted here because “Plaintiffs claim that [WellPet] has a uniform policy and

9 practice of misrepresenting on its packaging...” and “[e]njoining those alleged misrepresentations would

10 provide relief to the class as a whole.” *Broomfield*, 2018 WL 4952519, at *8. Further, “injunctive relief

11 is the ‘primary form of relief’ available under the consumer protection laws.” *Id.* “And in any event,

12 ‘whether the damages claims are incidental to the injunctive relief the plaintiffs seek is irrelevant, because

13 the plaintiffs are not seeking to recover damages for the proposed Rule 23(b)(2) class.’” *Id.*

14 **IV. CONCLUSION**

15 For the foregoing reasons, this Court should grant Plaintiff’s motion for class certification

16 pursuant to Fed. R. Civ. P. 23(b)(2), (b)(3), or 23(c)(4). In the alternative, Plaintiff respectfully requests

17 an opportunity to renew this motion to cure any deficiencies identified by the Court, including but not

18 limited to modifying the definitions of any of the proposed classes and substituting Plaintiff with a

19 different class representative.

1 Dated: June 29, 2020
2

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